

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THE ROCKPORT COMPANY, LLC,

Plaintiff,

v.

E.S. ORIGINALS, INC.

Defendant.

CIVIL ACTION NO. 04-12714-WGY

**STATEMENT OF UNDISPUTED FACTS IN SUPPORT
OF DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1, Defendant, E.S. Originals, Inc. ("ESO"), submits the following statement of material facts as to which it contends there is no genuine dispute:

1. In October 2001, ESO and Plaintiff, The Rockport Company, LLC ("Rockport"), entered into a license agreement ("Agreement" or "Agr."). This Agreement, Ex. A to the Declaration of Shalom In Support of Defendant's Motion for Summary Judgment, filed March 16, 2005 ("Shalom Dec."), was amended a number of times.
2. The Agreement gave Rockport an exclusive license for certain Rockport marks for children's footwear. (Agr., ¶¶ 3, 32(b)).
3. The Agreement required ESO to pay royalties based upon a percent of its sale of goods under the license. However, the Agreement required ESO to pay a minimum royalty to Rockport for each Contract Year included in the "Term." (Agr., ¶¶ 11, 12).
4. The Agreement defined the "Term" as the period ending on June 30, 2005 or on such earlier date as any party may terminate the Agreement.
5. The Agreement allowed Rockport to terminate the Agreement if ESO failed to achieve certain minimum sales. (Agr. ¶ 37).

6. The Agreement provided:

Payments upon Expiration or Termination. If this Agreement expires or is terminated for any reason before all payments hereunder have been made (including Guaranteed Minimum Royalties for the Contract Year in which such expiration or termination occurs), Licensee shall immediately thereafter submit a report and pay to Rockport any remaining unpaid balance for the Contract Year in which such expiration or termination occurs, even though the due date therefore has not yet occurred, and for any prior Contract Years.

(Agr., ¶ 15).

7. After the Agreement took effect, ESO developed the business associated with the Agreement, but did not have sufficient consumer support to reach the minimum sales targets set forth in paragraph 37 of the Agreement (even as amended). (Shalom Dec. at ¶¶ 3, 5).

8. On October 1, 2003, ESO notified Rockport that it would shut down its Rockport division. (Affidavit of Richard Paterno, filed by Rockport on March 30, 2005, at ¶7).

9. Pursuant to paragraph 37 of the Agreement, Rockport terminated the Agreement on January 12, 2004 giving as the reason for termination ESO's failure to achieve minimum sales. (Ex. B to Shalom Dec.).

10. ESO paid the guaranteed annual minimum royalty for the second Contract Year, ending June 30, 2004. (Shalom Dec. at ¶ 14).

11. Rockport's new licensee paid to Rockport the following royalties:

Period	Amount Paid
1/1/04- 3/31/04	\$ 27,581.81
4/1/04- 6/30/04	231,222.36

(Stipulation, Topper Decl., Ex. C).

12. Rockport alleges its damages equal the difference in the value of the ESO license and the BBC license. (Exhibit B to Declaration of Laura Topper, Deposition of Rockport under Fed. R. 30(b)(6), through Livingston, ("Tr.") at 7-8).

13. Rockport alleges the licenses are valued based upon two components, royalties and marketing. (Tr. at 8, 12)

14. Rockport has no evidence to quantify its marketing damages. (Tr. at 11-12, 14, 15-16, 18-19, Ex. A to Declaration of Laura Topper, Initial Disclosures of Rockport at § C).

15. Rockport has no evidence that the value of marketing provided by BBC is less than that provided by ESO. (Tr. at 14).

16. Rockport has retained no expert on damages. (Tr. at 7).

17. Discovery in this matter is closed, and the deadline for presenting expert reports is expired. (D.I. No. 9).

Date: October 12, 2005

Respectfully submitted,

ESO

by its attorneys,

/s/James J. Foster

James J. Foster, Esq. BBO #553285

jfoster@wolfgreenfield.com

Laura Topper, Esq. BBO #652364

ltopper@wolfgreenfield.com

WOLF, GREENFIELD & SACKS, P.C.

600 Atlantic Avenue

Boston, Massachusetts 02210

Tel: (617) 646-8000

Fax: (617) 646-8646